Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-13

BLEVINS POPCORN COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

and

AMERICAN FEDERATION OF GRAIN MILLERS, AFL-CIO,

Respondents,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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The American Federation of Grain Millers, AFL-CIO ("Union") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by Blevins Popcorn Company ("Company").*

* The administrative agency involved herein, the National Labor Relations Board, shall be referred to as "Board".

QUESTIONS PRESENTED.

Whether the reviewing court, the U. S. Court of Appeals for the District of Columbia Circuit, properly reviewed the decision of the Board.

STATEMENT OF THE CASE.

On November 2, 1973 the employees in an appropriate bargaining unit at the Company's Ridgeway, Illinois facility voted in a Board conducted election to be represented by the Union by a vote of 41 to 18 (A. 20-21). The Company refused to recognize and bargain with the Union and instead filed timely objections to the election (A. 21). Pursuant to appropriate provisions of the Board's rules and regulations, the Regional Director "caused a full and complete investigation to be made of the objections" (A. 21) and assuming the facts as presented by the Company wherever necessary (e.g. A. 24, 28) recommended the Company's objections be overruled in their entirety and that the Union be certified as the collective bargaining agent (A. 42).*

The Company continued to refuse to recognize and bargain with the Union and instead filed an appeal to the Board from

* The Company's repeated reference to a so called "*ex parte*" investigation, if intended to be suggestive of some impropriety by the Board, is wholly inaccurate (Co. Brief, pp. 2, 21). As is clear from the Regional Director's Report on Objections and Recommendations, he considered all evidence and positions submitted by the Company and the Union (e.g. A. 21) and where necessary even assumed factual disputes in favor of the Company (e.g. A. 24, 28). Thus the Company cannot say that its full position was not taken and considered.

Further, it is clear there is no absolute right to a hearing on objections because such a hearing could be used only as a delaying tactic. *Amalgamated Clothing Workers of America* v. *N. L. R. B.*, 424 F. 2d 818, 828-829 (D. C. Cir. 1970); *N. L. R. B.* v. *Carolina Natural Gas Corporation*, 386 F. 2d 571, 574 (4th Cir. 1967); *N. L. R. B.* v. *Joclin Manufacturing Company*, 314 F. 2d 627, 631-632 (2nd Cir. 1963); *N. L. R. B.* v. *O. K. Van Storage, Inc.*, 297 F. 2d 74, 76 (5th Cir. 1961).

the Regional Director's report on objections (Pet. Brief 7). The Board ordered a hearing to be held on one of the Company's objections which resulted in a hearing officer's finding, approved on appeal by the Board, to overrule said objection. As a result the Union was certified as the bargaining agent (Pet. Brief 7).

The Company continued to refuse to recognize and bargain with the Union (A. 14), which resulted in the instant charge and a decision by summary judgment and a Board order that the Company bargain with the Union as the certified bargaining agent (A. 8-19).

The Company continued to refuse to recognize and bargain with the Union. The Union, contending that greater remedies than a mere bargaining order were necessary, filed a petition to review in the United States Court of Appeals for the District of Columbia Circuit. The Board intervened in those proceedings and filed a cross petition for enforcement of its bargaining order. The lower court by a per curiam decision denied the Union's petition for review and granted the Board's cross petition for enforcement (A. 7-8), later denying the Company's petition for rehearing (A. 6) and the Company's request for rehearing *en banc* (A. 5).

The Company continues to refuse to recognize and bargain with the Union pending its petition before this Court, although no request for a stay of the lower court's order has been sought. Therefore the Company now is arguably in contempt of the lower court's order.

ARGUMENT.

The Company contends that the lower court, the U. S. Court of Appeals for the District of Columbia Circuit, in this and other cases, misconceived the appropriate standards for judicial review of NLRB representation proceedings, and that the lower court's order is at variance with other Courts of Appeals. Neither contention is correct and review by this Court is totally unwarranted.

1. This Court has limited its own review of the review by the Court of Appeals recognizing that, ". . . Congress has charged the Court of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders". *South Prairie Construction Company* v. *Local No. 627, International Union of Operating Engineers, AFL-CIO, (N. L. R. B.),* ..... U. S. ....., 96 S. Ct. 1842, 1844 n. 5 (May 24, 1976); *N. L. R. B.* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502, 71 S. Ct. 453, 455 (1951).

The appropriate standard for judicial review of a Board order was established by this Court in *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474, 71 S. Ct. 456 (1951). In this case the lower court said:

> The Board's findings are supported by substantial evidence in the record taken as a whole. *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 (1951). This court also finds that the Board's order is otherwise free from legal error. (A. 8.)

Thus, it is quite clear that the lower court is fully aware of the applicable standards for review, and the Company's suggestion that the lower court failed to understand or apply the *Universal Camera* standards (Pet. Brief p. 10-13) is patently absurd. The lower court's second review of the record and denial of the Company's petition for rehearing *en banc*, Judge MacKinnon ruling otherwise, completely dispels any notion raised by the Company here that the lower court did not fully, fairly and accurately review the Board's order precisely as Congress mandated. Upon this record, and in consideration of this Court's limited review of lower courts' review of Board orders, the petition is unwarranted.

2. This Court has frequently recognized, "Congress granted the Board a wide discretion to ensure the fair and free choice of bargaining representatives." *N. L. R. B.* v. *Savair Manufacturing Company*, 414 U. S. 270, 276-277, 94 S. Ct. 495, 498-499 (1973) quoting *N. L. R. B.* v. *Wyman-Gordon Co.*, 394 U. S. 759, 767, 89 S. Ct. 1426, 1430 (1969) and further citing *N. L. R. B.* v. *Waterman S. S. Co.*, 309 U. S. 206, 226, 60 S. Ct. 493, 503 (1940).*

See also *N. L. R. B.* v. *Hearst Publications Inc.*, 322 U. S. 111, 64 S. Ct. 851 (1944) in which this Court said:

> Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's when the latter have support in the record. (322 U. S. at 130, 64 S. Ct. at 860.)

Indeed, in reviewing any Board action this Court has repeatedly cautioned, ". . . courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy" *N. L. R. B.* v. *Gullett Gin Co.*, 340 U. S. 361, 363, 71 S. Ct. 337, 339 (1950) quoting from *Phelps Dodge Corp.* v. *N. L. R. B.*, 313 U. S. 177, 194, 61 S. Ct. 845, 852 (1941).

Specifically with respect to the Board's "wide discretion" in supervising elections for a collective bargaining agent under the Act this Court has recognized and approved the Board's practice ". . . that the Board does not 'police or censor propaganda used in the elections it conducts, but rather leave to the good sense of the voters the appraisal of such matters, and to opposing parties the task of correcting inaccurate and untruthful statements.' Steward-Warner Corp., 102 NLRB 1153, 1158 (1953)" and that, "the Board tolerates intemperate, abusive and inaccurate statements made by the Union during attempts to organize employees." *Linn* v. *United Plant Guard Wkrs. of Amer., Local 114*, 383 U. S. 53, 59, 86 S. Ct. 657, 662 (1966). Further, this Court has recognized that the various Board Re-

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* The Company is patently incorrect to argue that *Waterman S. S. Company, supra,* is no longer valid (Pet. Brief, p. 11) because, as noted above, the *Waterman* case was cited approvingly by this Court in its recent *Savair* decision (414 U. S. 276-277, 94 S. Ct. 498-499).

gional Directors to whom the Board has delegated its powers in election proceedings have the same expertise and wide discretion as the Board. *Magnesium Casting Co.* v. *N. L. R. B.*, 401 U. S. 137, 91 S. Ct. 599 (1971).

Upon the foregoing authorities it is most clear that the lower court correctly performed its review function, and found the Board's rulings and that of its Regional Director to be supported by substantial evidence with due consideration to the wide discretion which Congress mandated to be with the Board and its Regional Difectors.*

3. The Company's efforts to show a conflict among the various lower courts is clearly without merit. No two cases are exactly alike and it is for the Board in each particular case, not the reviewing court, to view all the facts and apply its wide discretion to matters such as: the alleged misrepresentation, the opportunity to reply, the impact upon the voters and other proper considerations. *Linn* v. *United Plant Guard Wkrs of America, Local 114*, 383 U. S. 53, 60, 86 S. Ct. 657, 662 (1966). Seemingly similar facts in separate cases and arising in different contexts may properly result in different findings upon over all considerations which the Board in its discretion must determine. Therefore alleged different results do not indicate

* The Company's reliance upon *N. L. R. B.* v. *Savair, supra* (Pet. Brief, p. 10) is misplaced. In *Savair* this Court considered a Union's promise to waive initiation fees only for those who signed a union card before the NLRB election; employees who failed or refused to sign would be required to pay an initiation fee. (414 U. S. 273-274, 94 S. Ct. 496-497). The Court found this to be discriminatory as a matter of law, and thus outside of the Board's area of wide discretion. (414 U. S. 278-279, 94 S. Ct. 499-500). The case at bar does not involve the organizing tactic considered in *Savair* and more importantly there is no showing that any claim made by the Union here was other than a claim or promise available to all employees without regard to whether or not they supported the Union. Thus, employees rights to support or not the Union were always preserved and the Union's claims could be left "to the good sense of the voters" without any suggestion or fear of discrimination (383 U. S. 53, 60, 86 S. Ct. 657, 662).

any conflict among the lower courts, as suggested by the Company.*

This Court can easily see the Board's Regional Director's detailed and complete analysis of the Company's election objections (A. 20-47) later reviewed by the Board (A. 11, n. 2). Particularly, the Regional Director noted the highly relevant consideration that the Company also engaged in a very extensive pre-election campaign in which it made its position clear to employees as follows: (1) the Union, if successful, could not begin its negotiations with present benefits plus more, but "all present benefits are wiped out"; (2) the employees' benefits would depend upon, *inter alia,* "the company's bargaining strength in giving nothing or as little as possible"; (3) the Company is not required to sign a contract; and (4) the employees do not necessarily retain their present benefits and the Company would "start negotiations at the *lowest rock bottom possible*" (A. 27-28, emphasis original). Therefore, even from this sample it is quite clear that the Company effectively campaigned against what it now claims to have been objectionable misrepresentations by the Union (compare the foregoing with A. 21-25). Obviously the Regional Director, the Board and the reviewing lower court considered the Union's pre-election campaign in the context of the over all campaign by the Employer and

* The Union will not overburden this brief to distinguish each and all individual election cases cited by the Company, however any comparison to the case at bar will reveal substantial and material differences in the facts which warranted a different result. For example in one of the cases relied on by the Company, *Tyler Pipe Industries Inc.* v. *N. L. R. B.*, 447 F. 2d 1136 (5th Cir. 1971) an election was set aside by the court because of union statements which were found *by the Board* to be "gross exaggeration[s]", "deliberate" and "reprehensible" in the context of an agreement between the company and the union to not further campaign after a certain date, which agreement the union violated but the company observed. However, in *Tyler* the Board ordered the Company to bargain with the union. Those facts have absolutely no similarity to the facts here. Indeed, the lower court in *Tyler* cautioned that objectionable acts cannot be considered alone but the entire circumstances must be considered (447 F. 2d at 1142).

correctly determined that the election was fair, and that the voters could fully appraise all parties' campaign material. *Linn* v. *United Plant Guard Wkrs of America, Local 114, supra,* 383 U. S. at 60, 86 S. Ct. at 662.

Consistent with overwhelming precedent cited in paragraphs 1 and 2 above, the Board and its Regional Director properly exercised their broad discretion, viewing all the circumstances, to overrule the Company's objections.

CONCLUSION.

A Court of Appeals authority to review a Board order is limited and this Court's authority to review the lower court's review is more limited. The lower court's review was precisely correct upon the controlling authorities of this Court. In any event, the Board's order is correct as a matter of law and is supported by substantial evidence in the record taken as a whole.

Therefore, the Company's petition for certiorari should be denied.

Respectfully submitted,

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